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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 650

HARTFORD ACCIDENT & INDEMNITY COMPANY ET AL.

vs.

DELTA & PINE LAND COMPANY.

BRIEF ON MOTION TO DISMISS OR AFFIRM AND ON THE MERITS.

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INDEX.

	Page
Brief on motion to dismiss or affirm and on the merits	1
Preliminary statement	1
Appellee's statement of the case	1
Mississippi statutes involved	5
Point I.	6
"There being 'an interest in Mississippi' with respect to which the contract was made, if there was in truth such an interest; did not warrant the application of the Mississippi statutes to the contract, because the parties had the right to contract with respect thereto in Tennessee and the laws of that State entered into the contract and gave them rights which they and each of them were protected in by the due process clause and the full faith and credit clause of the Constitution."	
Whereto we answer:	
A. Sufficient factual background not set up to overcome presumption of constitutional validity of Mississippi's statute	6
American Fire Insurance Co. v. King Lumber & Mfg. Co., 250 U. S. 11, 63 L. Ed. 815	10, 30
Baldwin v. Missouri, 281 U. S. 586, 74 L. Ed. 1056	9
Bell v. Bruen, 1 How. 169	8
Boyle v. Zacharie, 6 Pet. 635	8, 9
Bradford Electric Co. v. Clapper, 286 U. S. 145, 154, 76 L. Ed. 1026, 1032	7
2 Cooley's Briefs on Insurance, 2d Ed. 1035	8, 23
Dixon's Executors v. Ramsay's Executors, 3 Cranch 317, 2 L. Ed. 453	9
Ewing v. Warren, 141 Miss. 223, 109 So. 691	9
Farmers & Merchants Bank v. Federal Reserve Bank, 262 U. S. 649, 67 L. Ed. 1181	11
Farmers Loan & T. Co. v. Minnesota, 280 U. S. 204	9
Fidelity Mutual Ins. Co. v. Miazza, 93 Miss. 18, 46 So. 817	7
Frick v. Pennsylvania, 268 U. S. 473, 69 L. Ed. 1058	9
German Alliance Insurance Co. v. Lewis, 233 U. S. 389, 58 L. Ed. 1011	11, 16
Green v. Van Buskirk, 7 Wall. 139, 19 L. Ed. 109	9
Gully v. International Co., 165 Miss. 86, 145 So. 907	10

Page

Hanover National Bank v. Montgomery, 79 Miss. 743, 30 So. 635 7

Hardware Dealers Mut. Fire Ins. Co. v. Glidden, 284 U. S. 151, 76 L. Ed. 214 11

Hartford Accident & Indemnity Co. v. N. O. Nelson Mfg. Co., 78 L. Ed. 470 ..... 8, 10, 11, 17, 27, 35, 11

Heybrink v. Lee, 280 U. S. 111, 74 L. Ed. 217 11

Jahier v. Roscoe, 62 Miss. 699 9

Lamar v. Micou, 112 U. S. 452, 28 L. Ed. 751 8

Lumber Co. v. Page, 109 Conn. 253, 146 Atl. 293 10

O'Gorman v. Hartford F. Ins. Co., 282 U. S. 251, 75 L. Ed. 324, 72 A. L. R. 1163 ..... 6 11, 16

Ormsby v. Chase, 78 L. Ed. 231 7

Pennsylvania, etc., Co. v. Gold Issue, etc., Co., 243 U. S. 93, 61 L. Ed. 610, 37 S. Ct. 344 ..... 11, 27

Pennsylvania L. M. F. Ins. Co. v. Meyer, 197 U. S. 415 ..... 11, 12, 14

Power Mfg. Co. v. Saunders, 274 U. S. 490, 71 L. Ed. 1165, 47 S. Ct. 678 11

Pritchard v. Norton, 106 U. S. 124, 27 L. Ed. 108 ..... 8, 23, 31

Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. Ed. 613 9

Richardson v. Neblett, 122 Miss. 350, 72 So. 575 9

St. Louis v. Wiggins Ferry Co., 11 Wall. 423, 20 L. Ed. 192 9

Stuyvesant Ins. Co. v. Smith Motor Sales Co., 135 Miss. 585, 99 So. 575 ..... 7, 20

Taylor v. Merchants' Fire Ins. Co., 9 How. 390, 13 L. Ed. 187 9

Terrace v. Thompson, 263 U. S. 218, 68 L. Ed. 276 10

The Kensington, 183 U. S. 263, 46 L. Ed. 192 8

Tyson v. Banton, 273 U. S. 418, 434, 71 L. Ed. 718, 721 .. 11

Union Trust Co. v. Grossman, 245 U. S. 118, 62 L. Ed. 372 8

Washington v. Superior Court, 289 U. S. 363, 77 L. Ed. 1259 ..... 11, 12

White v. Miller, 160 Miss. 734, 130 So. 146 10

Wilson v. Cox, 49 Miss. 538 9

Wisconsin v. Insurance Co., 127 U. S. 265, 32 L. Ed. 239 .. 7

Young v. Masci, 289 U. S. 258, 77 L. Ed. 1161 7

B. Appellee's domicil being in Mississippi, her laws should admeasure the rights herein as to that within her jurisdiction 12

Bothwell v. Buckbee, Mears & Co., 275 U. S. 278, 72 L. Ed. 280 ..... 12, 27

Page

C. Regulating only that done in Mississippi in accordance with Mississippi's public policy, appellant may not, having entered Mississippi, thereof complain..... 12

Allgeyer v. Louisiana, 165 U. S. 578, 41 L. Ed. 832....18, 26, 28
Bergholm v. Peoria Life Ins. Co., 284 U. S. 489..... 18
Berry v. Lamar Life Ins. Co., 165 Miss. 405, 145 So. 887.. 18
Bonner v. Mutual Life Ins. Co., 36 So. 538..... 18
Bunting v. Oregon, 212 U. S. 126, 61 L. Ed. 830..... 15
Cleveland, P. & A. R. Co. v. Pennsylvania, 15 Wall. 300, 320, 21 L. Ed. 179, 187..... 13
Commonwealth v. Hock Age Mutual Benefit Association, 13 Leg. Int. 245, 10 Phila. 554..... 15
Conn. Mutual Life Ins. Co. v. Spratley, 172 U. S. 602, 43 L. Ed. 569..... 21
Davis v. Western Union, etc. Co., 107 Ky. 327, 54 S. W. 849, 92 Am. St. Rep. 371..... 19
Dodson v. Telegraph Co., 97 Miss. 101, 52 So. 693..... 18
Dominion Hotel Co. v. Ontario, 240 U. S. 266, 62 L. Ed. 597..... 16
Eagle Ins. Co. v. Ohio, 153 U. S. 445, 38 L. Ed. 779..... 15
Fidelity, etc. Co. v. Tafoya, 270 U. S. 426, 70 L. Ed. 661.. 21
Gallagher v. State Mutual Life Ins. Co., 150 Ala. 543, 43 So. 833..... 21, 11
Green v. Frazier, 253 U. S. 233, 64 L. Ed. 878..... 16
Hebe Co. v. Shaw, 248 U. S. 297, 63 L. Ed. 256..... 15
Hooper v. People, 155 U. S. 648, 39 L. Ed. 297..... 14
Hutchinson Ice Cream Company V. State, 242 U. S. 153, 61 L. Ed. 217..... 15
John Hancock Life Ins. Co. v. Warren, 181 U. S. 73, 45 L. Ed. 755..... 14
Jones v. Portland, 245 U. S. 217, 62 L. Ed. 252..... 15
Lafayette Ins. Co. v. French, 18 How. 404, 407, 15 L. Ed. 451, 452..... 14
La Tourette v. McMaster, 248 U. S. 465, 63 L. Ed. 362, 39 S. Ct. 160..... 16
McCarter v. Firemen's Ins. Co., 74 N. J. Eq. 382, 382, 29 L. R. A. (N. S.) 1194, 135 Am. St. Rep. 708, 73 Atl. 80, 411, 18 Am. Cas. 1048..... 17
National Casualty Co. v. Mitchell, 138 So. 808, 162 Miss. 197..... 20
New York Life Ins. Co. v. Cravens, 178 U. S. 389, 44 L. Ed. 1116..... 14, 21, 23, 30, 11
Northwestern Mutual Life Ins. Co. v. Riggs, 203 U. S. 243, 51 L. Ed. 168..... 14, 31
Nutting v. Massachusetts, 183 U. S. 553, 46 L. Ed. 327, 22 Sup. Ct. Rep. 238..... 21, 30

	Page
N. Y. ex rel. McCall, 245 U. S. 345, 62 L. Ed. 334	14
N. Y. ex rel. v. Hesterberg, 211 U. S. 31, 53 L. Ed. 75	16
Ohio v. Chattanooga, etc. Co., 289 U. S. 140, 77 L. Ed. 1308	14, 27
Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. Ed. 552	11
Pacific Tel. Co. v. Underwood, 37 Neb. 315, 55 N. W. 1057, 40 Am. St. Rep. 490	20
Palmetto Fire Ins. Co. v. Cohn, 272 U. S. 295, 71 L. Ed. 243	21
Parrott v. Benson, 111 Wash. 116, 191 Pac. 986	16
Paul v. Virginia, 8 Wallace (U. S. 1869) 168, 19 L. Ed. 357	11, 21
Royal Arcanum v. Green, 237 U. S. 531, 59 L. Ed. 1089, reversing 206 N. Y. 591, 100 N. E. 441	14
Security Savings Bank v. California, 263 U. S. 282, 68 L. Ed. 301	16
Southern Express Co. v. Hammett, 54 Miss. 536	18, 19
Standard Accident Insurance Co. v. Brooks, 111 Miss. 109, 71 So. 253, 654	20
State v. Cantwell, 179 Mo. 245, 78 S. W. 569, affirming Cantwell v. Mo., 199 U. S. 602, 50 L. Ed. 329	16
State v. Pitney, 79 Wash. 608, 140 Pac. 918	16
Stipcich v. Metropolitan L. Ins. Co., 277 U. S. 311, 320, 72 L. Ed. 895, 899, 48 S. Ct. 512	14
Swing v. Brister, 87 Miss. (1905) 528	18
Universal Life Ins. Co. v. Whitehead, 58 Miss. 231	18
U. S. v. Standard Brewery, 251 U. S. 210, 64 L. Ed. 209	16
Western, etc. Indemnity Co. v. Rupp, 235 U. S. 261, 59 L. Ed. 220	14
Western Union, etc., Co. v. Eubanks, 100 Ky. 591, 38 S. W. 1068, 36 L. R. A. 711, 66 Am. St. Rep. 361	20
Western Union, etc., Co. v. Longwill, 5 N. W. 308, 21 Pac. 339	20
D. Tennessee decisions referred to not applicable herein	21
Adams, State Rev. Agent, v. [illegible] & M. V. R. R. Co., 77 Miss. 278	22
Bankholzer v. New York L. Ins. Co., 168 U. S. 402, 44 L. Ed. 1124, 20 S. Ct. 972	27
Brister v. Swing, 87 Miss. 528	26
Bristol v. Bostwick, 146 Tenn. 205	22
Chicago & A. R. Co. v. Wiggins Ferry Co., 119 U. S. 615, 622, 30 L. Ed. 519, 522, 7 Sup. Ct. Rep. 398	22
Cooper v. California, 155 U. S. 618, 39 L. Ed. 297	26
Cross v. Burke, 146 U. S. 82, 36 L. Ed. 896	22
[illegible]ba R. Co. v. Crosby, 222 U. S. 473, 56 L. Ed. 275	23

Page
Cluney v. Guy, 189 U. S. 395, 47 L. Ed. 1859 27
Guthrie v. Indemnity Association, 101 Tenn. 643 22
Hanley v. Donoghue, 116 U. S. 1, 6, 29 L. Ed. 535, 537, 6 Sup. Ct. Rep. 242 28
Insurance Co. v. Block, 12 Ohio Cir. Ct. R. 221 23
Johnson v. New York L. Ins. Co., 187 U. S. 491, 496, 47 L. Ed. 273, 275, 23 S. Ct. 191 27
London Assurance Corporation v. Barrieau, 167 U. S. 149, 42 L. Ed. 113 23
National Union Fire Ins. Co. v. Wanberg, 200 U. S. 71, 67 L. Ed. 136 27
New York Life Insurance Co. v. Head, 234 U. S. 162, 58 L. Ed. 1261 ..... 24, 27, 29
Phoenix Cotton Oil Co. v. Royal Indemnity Co., 110 Tenn. 112 22
Townsend v. Jemison, 9 How. 407, 13 L. Ed. 194 28

E. Appellant's cases 28

Ætna Life Ins. Co. v. Duncan, 266 U. S. 380, 69 L. Ed. 342 30
Binney v. Nelson, 183 U. S. 144, 46 L. Ed. 125 30
Equitable Life Assurance Society v. Pettus, 140 U. S. 226, 35 L. Ed. 197 30
Erie R. Co. v. Williams, 233 U. S. 685, 706, 58 L. Ed. 1155, 1163, 51 L. R. A. (N. S.) 1097, 34 Sup. Ct. Rep. 761 30
Home Ins. Co. v. Dick, 281 U. S. 397, 74 L. Ed. 926 32
Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 576, 59 L. Ed. 364, 368, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570 30
Le Breton v. Miles, 8 Paige 261 31
Lloyd v. Guibert, L. R. 1 Q. B. 115, 120 31
Master, 237 U. S. 63, 59 L. Ed. 839, 35 Sup. Ct. Rep. 501 30
Mutual Life Ins. Co. v. Hall, 193 U. S. 551, 48 L. Ed. 788 30
New York Life Insurance Co. v. Dodge, 246 U. S. 357, 62 L. Ed. 772 29
Pritchard v. Norton, 106 U. S. 124, 27 L. Ed. 104, 1 Sup. Ct. Rep. 403 31
Robinson v. Bland, 2 Burr. 1077, 1078 31
South Carolina ex rel. Phoenix Mut. L. Ins. Co. v. Mc-Ward v. Fire Insurance Company, 82 Miss. 124 37
Wayman v. Southard, 10 Wheat. 1, 18, 6 L. Ed. 253, 261 31

F. Provision as to notice may well be construed as appertaining to the remedy and therefore subject to the law of the forum 40

Page

National Sanitary Co. v. Architectural Decorating Co., 278 N. Y. 368, 16 N. E. (2d) 631 10

Point II 11

Contract contained three separate and distinct parts, each of which was complete in itself and capable of performance without reference to the others 11

Matthew v. Employers' Liability Assurance Corp., 111 N. Y. State 46 11

Mutual Life Insurance Co. v. Cohen, 179 N. Y. 321, 72 N. E. (2d) 187 11

STATUTES CITED

McKinney's Consolidated Laws of New York, Section 291 2, 10, 11

Section 31 2

Revised Civil Statutes, Article 5431 11

McKinney's Code, Section 1139, amended by Chapter 113, General Laws, of 1939 10

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HARTFORD ACCIDENT & INDEMNITY COMPANY

ET AL.,

vs.

DELTA & PINE LAND COMPANY.

BRIEF ON MOTION TO DISMISS OR AFFIRM AND ON THE MERITS.

Preliminary Statement.

Appellee reiterates its statements opposing jurisdiction, asks that same be considered as a Motion to Dismiss or Affirm, and that the cause be dismissed for want of a substantial Federal question, as therein contended; or, if not, affirmed; and having so thus done, this motion having been continued to the hearing on the merits, now here submits that the cause be affirmed.

Appellee's Statement of the Case.

Appellee prefers to state the case as an entirety as presented:

Delta & Pine Land Company, herein called Appellee and/or Land Company, a Mississippi Corporation, under

the declaration, "having its principal place of business in the town of Scott * * * Mississippi * * * complain of the Hartford Accident & Indemnity Company, herein called Indemnity Company and/or appellant, a corporation duly chartered under the laws of the State of Connecticut and having its principal place of business in the City of Hartford, Connecticut, and qualified and authorized to do business in the State of Mississippi by complying with the laws of the State of Mississippi * * *".

About January 1, 1928, Land Company applied to Indemnity Company for a fidelity bond, which Indemnity Company delivered to Land Company through its agency in Memphis, whereunder Indemnity Company promised to pay to Land Company, within sixty days after satisfactory proof of loss, such pecuniary loss as Land Company (Tr., 1) should sustain through the fraud of any employe "in any position, anywhere during the period commencing with the respective dates set opposite the names of the employees in such schedule * * *". Copy is Exhibit "A" to declaration.

The location (Tr., 13) of eight of the officials bonded, including the President, Vice President, Treasurer, Secretary, Assistant Treasurer, Bookkeeper, Clerk and Purchasing Agent was given as "Location, Memphis, Tenn." The residue, twenty-one in number, were given as within Mississippi. As admitted in the brief for appellant, "appellee moved its office force from Memphis to Mississippi, and its Treasurer moved with it to Mississippi * * *". Appellant conceded that "that was inferable from the allegations in the declaration."

The Treasurer, H. H. Harris, after having moved, was guilty of fraud in Bolivar County, Mississippi, by reason whereof plaintiff was damaged in the sum of $2,703.79 (Tr., 9).

Appellee gave written notice of the default to Indemnity Company at its home office, with affirmative proofs of loss, and the suit is brought before the expiration of twelve months after the filing thereof. Exhibit "A" (Tr., 11), shows the home office of appellant, Hartford, and as to the appellee thus: "Delta and Pine Land Company of Mississippi and/or Delta Farm Company and/or Empire Plantation Company (as interest may appear) * * *."

Upon discovery of any dishonest act, "Land Company was to give immediate written notice thereof to the Surety Company at its home office."

Special plea in bar was filed by appellant averring "before and at the date of the contract (appellee) was doing business in the State of Tennessee and at its principal office at Memphis * * * and defendant was also then, as it is now, doing business in the State of Tennessee and had an agency at Memphis * * * and plaintiff through its said office at Memphis * * * applied to defendant through its agency at Memphis * * * for said bond, constituting said contract * * * and defendant through its agency at Memphis executed and delivered the same to plaintiff at its said office at Memphis, and said contract is a Tennessee contract and is governed by the laws of Tennessee, and full faith and credit must be given thereto in courts" of Mississippi, it having been decided in Tennessee that such conditions or limitations as to time are valid, and if not made within fifteen months after the termination of the suretyship for the defaulting employee, the rights under the contract terminated. The employee's relationship ceased December 31, 1929, as plaintiff did not make claim upon defendant until June 22, 1931, the same was barred (Tr., 18, 19).

Demurrer was interposed, averring the laws of Mississippi applicable, which was sustained. Appellant declined to plead further. Judgment final was rendered (Tr., 21).

On appeal to the Supreme Court, the judgment was affirmed, the Court stating:

> "But clearly under Section 5131, Code 1930, defining insurance, this indemnity bond is a contract of insurance within the purview of that statute; and, further, it being expressly provided therein that all contracts of insurance on property, lives or interests in this state shall be deemed to be made therein, in our judgment, makes the contract herein under review a Mississippi contract and solvable under the laws of this state. The contract here provided or stipulated that the appellee should be indemnified from loss by the defalcation of H. H. Harris in any position anywhere, and when he, the employee and the insured herein, removed to Mississippi and there defaulted, so far as the appellee is concerned its interest was insured or indemnified by the appellant in Mississippi, and, under the provision quoted from the above statute, became operative, and this state is obligated to enforce it, as a Mississippi contract, although it contained all the elements necessary to make it a Tennessee contract, but for the statute.
>
> "This court is committed to the proposition that if lives or property is insured in this state, although the contract be made in another state, the contract is solvable under the laws of our own state. *Fidelity Mutual Insurance Co.* v. *Miazza*, 93 Miss. 18, 46 So. 817; *Stuyvesant Ins. Co.* v. *Smith Motor Sales Co.*, 135 Miss. 585, 99 So. 575. The contract of indemnity in the case at bar, in our opinion, permitted the removal of employees to any place and indemnified against loss wheresoever it occurred. There being an interest of the appellee indemnified, and the employee having removed to Mississippi and his defalcation having occurred therein, whereby the appellee sustained a loss, and under the terms of the contract no notice of said removal being required, the contract became an indemnity contract against loss of interest of the appellee in this state. When the statute declares that such a contract shall be deemed to be made in this state, it

means that the conflict of law between the two states is eliminated, and thereby under the above authorities, a contract for fifteen months' notice was a limitation of the action enforceable as such in this state."

Suggestion of Error was filed; was overruled (Tr., 29, 30), and regular appellate proceedings had hereto.

Mississippi Statutes Involved.

Section 2294, Mississippi Code 1930, in effect since 1906:

> "*Period of limitations not to be changed by contract.*—The limitations prescribed in this chapter shall not be changed in any way whatsoever by contract between parties, and any change in such limitations made by any contract stipulation whatsoever shall be absolutely null and void; the object of this statute being to make the period of limitations for the various causes of action the same for all litigants."

Construed in *Dodson* v. *Western Union* (1910), 97 Miss. 104, 52 So. 693; *Standard, etc. Ins. Co.* v. *Broom* (1916), 111 Miss. 409, 71 So. 653; *Sovereign Camp* v. *Miller* (1921), 125 Miss. 502, 87 So. 892; *Stuyvesant Ins. Co.* v. *Smith Motor Sales Co.*, 135 Miss. (1924) 585, 99 So. 575; *National Casualty Co.* v. *Mitchell* (1933), 162 Miss. 197, 138 So. 808; *Berry* v. *Lamar Life Ins. Co.* (1933), 165 Miss. 405, 145 So. 887; *Mutual Life Ins. Co.* v. *Hebron* (1933), 166 Miss. 145, 146 So. 445.

Section 5131, Mississippi Code 1930, in effect before 1906:

> "*What is insurance—situs of contract.*—A contract of insurance is an agreement by which one party for a consideration promises to pay money or its equivalent, or to do some act of value to the assured, upon the destruction, loss or injury of something in which the assured or other party has an interest, as an in-

demnity therefor; and it shall be unlawful for any company to make any contract of insurance upon, or concerning any property or interest or lives in this state, or with any resident thereof; or for any person as insurance agent or insurance broker to make, negotiate, solicit, or in any manner aid in the transaction of such insurance unless and except as authorized under the provisions of this chapter. All contracts of insurance on property, lives or interests in this state shall be deemed to be made therein."

Construed in *Fidelity & Ins. Co.* v. *Miazza* (1908), 93 Miss. 18, 46 So. 817; *Stuyvesant Ins. Co.* v. *Smith Motor Sales Co.* (1924), 135 Miss. 585, 99 So. 575.

Appellant makes two points:

POINT I.

"There being 'an interest in Mississippi' with respect to which the contract was made, if there was in truth such an interest, did not warrant the application of the Mississippi statutes to the contract, because the parties had the right to contract with respect thereto in Tennessee and the laws of that State entered into the contract and gave them rights which they and each of them were protected in by the due process clause and the full faith and credit clause of the Constitution",

Whereto, we answer:

A. *Sufficient factual background not set up to overcome presumption of constitutional validity of Mississippi's statute.*

Appellant substantially admits liability, but seeks to forfeit appellee's rights through limitation.

Under Mississippi practice, the agreement, being in writing and exhibited, controlled the averments of the pleader as to the rights thereunder arising. *Hanover National*

Bank v. *Montgomery*, 79 Miss. 443, 30 So. 635. Construing the pleadings most strongly against the pleader, the policy and the riders give uniformly the appellant "as Hartford Accident & Indemnity Company, Hartford, Connecticut," whereat proof of loss under oath is to be made and wherefrom payment was to originate. Appellant was likewise qualified to do business and did business in Mississippi wherein it had become obligated to conform to Mississippi's laws and had only "an agency at Memphis," through which application was made and whereby the policy was delivered.

At the date of the default, appellee's entire operations were centered at its Mississippi domicil, Scott, wherefrom it had sojourned in the times of prosperity, to establish "its principal office at Memphis," but the time whereat this was done, the duration of the establishment, the extent of that thereunder to be accomplished are in no way averred; assuming, under the pleadings, as we may do, appellant's operation was of a Mississippi cotton plantation approximating 10,000 acres or more, and this was its only business, and that it carried on such plantation business in Mississippi. There Harris, its treasurer, had to account and all debts due by him to it were there solvable and his tort liability was admeasured by Mississippi's laws.

Ormsby v. *Chase*, 78 L. Ed. 231; *Young* v. *Masci*, 289 U. S. 258, 77 L. Ed. 1161; *Bradford Electric Co.* v. *Clapper*, 286 U. S. 145, 154, 76 L. Ed. 1026, 1032.

As to the criminal aspect of Harris' act, no State other than Mississippi would have jurisdiction, *Wisconsin* v. *Insurance Co.*, 127 U. S. 265, 32 L. Ed. 239.

Harris' responsibility there accruing, whereasto appellee was to be indemnified, had a fixed Mississippi situs, *Fidelity Mutual Ins. Co.* v. *Miazza*, 93 Miss. 18, 46 So. 817, *Stuyvesant Ins. Co.* v. *Smith Motor Sales Co.*, 135 Miss. 585, 99 So. 575, and the decisions of Mississippi's Court as to her

statutes are here controlling. *Hartford Accident & Indemnity Co.* v. *N. O. Nelson Mfg. Co.*, 78 L. Ed. 470. The decisions of this Court situs such an indemnity agreement in Mississippi.

The Kensington, 183 U. S. 263, 46 L. Ed. 192; *Pritchard* v. *Norton*, 106 U. S. 124, 27 L. Ed. 108, citing *Boyle* v. *Zacharie*, 6 Pet., 635, *Bell* v. *Bruen*, 1 How., 169, and declaring:

> "We do not hesitate, therefore, to decide that the bond of indemnity sued on was entered into with a view to the law of Louisiana as the place for the fulfillment of its obligation; and that the question of its validity, as depending on the character and sufficiency of the consideration, should be determined by the law of Louisiana, and not that of New York."

This was, therefore, a contract of indemnity whereasto Mississippi's laws admeasured responsibility of Harris to appellee. Appellee was to be held harmless and the provision of the policy (Tr., 12), "in case such limitation be void under the law of the place governing the construction hereof, then within the shortest period of limitation permitted by such law," by Mississippi law, Code Sections 2194-5130 as construed by its Supreme Court, becomes a proper provision; otherwise such provision would have no place therein, the Tennessee law being that the 15 months limitation was valid. Compare *Union Trust Co.* v. *Grossman*, 245 U. S. 418, 62 L. Ed. 372.

The law of the domicil governs the status of the person. *Lamar* v. *Micou*, 112 U. S. 452, 28 L. Ed. 751. Appellant's contention is that a Mississippi corporation may, by a temporary sojourn in Tennessee integrate Tennessee's laws into its operations so effectively as to set at naught the public policy of Mississippi. *The Kensington*, 183 U. S. 269, 46 L. Ed. 193; 2 *Cooley's Briefs on Insurance*, 2nd Ed., 1035.

In *Black* v. *Zacharie,* 3 How. 483, 11 L. Ed. 690, the law of the owner's domicil determined the validity of the disposition of personalty. All rights as to personalty may be governed by the law of the domicil. *Dixon's Executors* v. *Ramsay's Executors,* 3 Cranch 317, 2 L. Ed. 453; *St. Louis* v. *Wiggins Ferry Co.,* 11 Wall. 423, 20 L. Ed. 192. In modern times actual situs may confer sovereignty thereover. *Pullman Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18, 35 L. Ed. 613; *Frick* v. *Pennsylvania,* 268 U. S. 473, 69 L. Ed. 1058, declaring:

> "The laws of other states have no bearing save as that State expressly or tacitly adopts them—their bearing then being attributable to such adoption, and not to any force of their own."

Farmers Loan & T. Co. v. *Minnesota,* 280 U. S. 204; *Baldwin* v. *Missouri,* 281 U. S. 586, 74 L. Ed. 1056; 79 A. L. R. 346, note; 86 A. L. R. 745, note, 761, note.

The dominion of a State over personalty there situated is complete. *Green* v. *Van Buskirk,* 7 Wall. 139, 19 L. Ed. 109; *Tayloe* v. *Merchants' Fire Ins. Co.,* 9 How. 390, 13 L. Ed. 187.

Under Mississippi Code 1930, Section 1401, in effect for many years, all personal property situated in Mississippi descends according to its laws regardless of all marital rights and notwithstanding the domicil of the deceased owner.

Ewing v. *Warren,* 144 Miss. 233, 109 So. 601; *Richardson* v. *Neblett,* 122 Miss. 723, 84 So. 695, 10 A. L. R. 272; *Neblett* v. *Neblett,* 112 Miss. 550, 72 So. 575; *Jahier* v. *Roscoe,* 62 Miss. 699; *Wilson* v. *Cox,* 49 Miss. 538.

At the time of the execution of the bond there were twice as many employes, whose fidelity was guaranteed, located in Mississippi as in Tennessee. The bond only refers to location for purposes of identification and not as a con-

tractual situs whereat employes shall solely work, for thereunder their acts were covered "in any position, anywhere." (Tr., 11.)

The nature of Harris' duties would carry him to Mississippi where the farm was, and there is no covenant that Harris remain in Tennessee or his duties be there confined. All that Mississippi has done is to make applicable to that portion of the business affecting Mississippi's right and Mississippi property, the public policy of Mississippi. Compare *Terrace* v. *Thompson*, 263 U. S. 218, 68 L. Ed. 276. This was held constitutional in *American Fire Insurance Co.* v. *King Lumber & Mfg. Co.*, 250 U. S. 11, 63 L. Ed. 815, where the Court said:

> "The Florida statute does not attempt to invade Pennsylvania and exercise control there. It stays strictly at home in this record, and regulates the Insurance Company when it comes to the State to do business with the citizens of the State and their property."

Appellant well knew the business of appellee and its situs, and the holdings of Mississippi's Court. Being an Insurance Company, it did not disregard the possibility of this imposition of liability in accordance with Mississippi's decisions, but in fixing its premiums undoubtedly exacted compensation for this potentiality, and so having done, may not therefrom profit. *Lumber Co.* v. *Page*, 109 Conn. 253, 146 Atl. 293; *Hartford etc. Co.* v. *N. O. Nelson Mfg. Co.*, 78 L. Ed. 470.

These statutes with these judicial decisions (which by reenactment had become integrated thereinto, *Gully* v. *International Co.*, 165 Miss. 86, 145 So. 907, *White* v. *Miller*, 160 Miss. 734, 130 So. 146), admonished appellant of Mississippi's laws, wherewith compliance must be had, and if appellant misinterpreted, no constitutional question is

raised. *Pennsylvania, etc. Co.* v. *Gold Issue, etc. Co.*, 243 U. S. 93, 61 L. Ed. 610. These statutes of Mississippi, with these judicial decisions, became a part of appellee's protection "as fully as if they had been expressly referred to and incorporated in its terms." *Farmers & Merchants Bank* v. *Federal Reserve Bank*, 262 U. S. 660, 67 L. Ed. 1181.

In *Washington* v. *Superior Court*, 289 U. S. 363, 77 L. Ed. 1259, the Court said:

> "It has repeatedly been said that qualification of a foreign corporation in accordance with the statutes permitting its entry into the State constitutes an assent on its part to all the reasonable conditions imposed. (Citing cases.) It is true that the corporation's entry may not be conditioned upon surrender of constitutional rights, as was attempted in the cases on which the appellant relies. (Citing cases.) And for this reason a State may not exact arbitrary and unreasonable terms respecting suits against foreign corporations as the price of admissions. *Power Mfg. Co.* v. *Saunders*, 274 U. S. 490, 71 L. Ed. 1165, 47 S. Ct. 678."

It is not unreasonable for the State under such facts to secure to its citizens a remedy in the domestic forum, *Pennsylvania L. M. F. Ins. Co.* v. *Meyer*, 197 U. S. 415, 49 L. Ed. 815, and being an insurance company, the measure of Mississippi's rights are admeasured by *Hartford, etc. Co.* v. *Nelson*, 78 L. Ed. 470; *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389, 58 L. Ed. 1011; *O'Gorman* v. *Hartford F. Ins. Co.*, 282 U. S. 251, 75 L. Ed. 324, 72 A. L. R. 1163; *Tyson* v. *Banton*, 273 U. S. 418, 434, 71 L. Ed. 718, 724; *Hardware Dealers Mut. Fire Ins. Co.* v. *Glidden*, 284 U. S. 151, 76 L. Ed. 214; *Herbring* v. *Lee*, 280 U. S. 111, 74 L. Ed. 217. We invoke the presumption of validity vouchsafed in *Hardware Dealers, etc.* v. *Glidden*, 284 U. S. 151, 76 L. Ed. 214, *supra*. Facts alone are admitted, not conclusions, and under the facts set up in defendant's plea

to appellee's declaration, there is naught adequate to strike down Mississippi's statute as adjudicated by Mississippi's Court, wherefrom this appeal is taken; even if appellant be not estopped by premium fixation from raising question.

B. *Appellee's domicil being in Mississippi, her laws should admeasure the rights herein as to that within her jurisdiction.*

Harris being bound to account in Mississippi for that by him there received, to appellee, the rights under this contract should be admeasured as to Mississippi property within Mississippi's territory by Mississippi's laws when appellee is a Mississippi corporation that may not therefrom migrate, and when, as to this point, Mississippi has a definite public policy.

Compare *Bothwell* v. *Buckbee, Mears & Co.*, 275 U. S. 278, 72 L. Ed. 280; *Pennsylvania Lumbermen's Mut. F. Ins. Co.* v. *Meyer*, 197 U. S. 407, 416, 49 L. Ed. 810, 815:

> "The contract did not specify the place where payment for the loss should be made, so that under the common rule the insurer would be required to make the payment in Minnesota, the domicil of the insured."

No performance whatsoever was being had of any portion of this contract, wherefor recovery is herein sought, within Tennessee, and the place of performance may well be made the basis of the law to control by the Sovereignty having jurisdiction thereover.

C. *Regulating only that done in Mississippi in accordance with Mississippi's public policy, appellant may not, having entered Mississippi, thereof complain.*

Compare *Washington v. Superior Court, supra.*

In *Pennsylvania, etc. Insurance Co.* v. *Meyer*, 197 U. S. 415, 49 L. Ed. 815, a contract was made in Philadelphia

covering property in New York, and thereof Mr. Justice Peckham said:

> "Although the contract may have been a Pennsylvania contract, yet it does not follow that all its provisions were to be carried out in that state. The policy of insurance was * * * upon real estate within the State of New York * * *. After the defendant and the owner had either agreed upon the amount of loss, or the same had been estimated and determined upon by the appraisers, as provided for in the policy, the defendant, by the terms of that instrument, promised to pay to the owner the amount thus arrived at, within sixty days. The policy does not state in so many words where such payment is to be made, but it is a general rule that, in the absence of any such provision, or of any language from which a different inference may be inferred, the right of the creditor to demand payment at his own domicil exists, and it is the duty of the debtor to pay his debt to the creditor in that way. It is stated in the opinion of this Court, by Mr. Justice Field, in *State Tax on Foreign-held Bonds (Cleveland, P. & A. R. Co.* v. *Pennsylvania,* 15 Wall. 300, 320, 21 L. Ed. 179, 187): 'All the property there can be in the nature of things in debts of corporations belongs to the creditors, to whom they are payable, and follows their domicil, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations from numerous adjudications, but no number of authorities, and no forms of expression, could add anything to its obvious truth, which is recognized upon its simple statement.'"

And this Court then held that although that was a Pennsylvania contract, yet the cause of action arose in New York, and therefor thus arising suit might thus be brought in New York; and that at issue is, was Mississippi impotent to apply its law to a cause of action so thus arising.

As was further said in *Pennsylvania L. M. F. Ins. Co.* v. *Meyer, supra:*

> "It is not unreasonable for the state, under such facts, to endeavor to secure to its citizens a remedy in the domestic forum upon this very important class of contracts."

Compare *Lafayette Ins. Co.* v. *French*, 18 How. 404, 407, 15 L. Ed. 451, 452. It was an express part of this contract that the provision here relied on by appellant as controlling might be void, and if void, there was an express contract "that the shortest period of limitation permitted by such law" should control. (Tr., 12.) Thereof appellant, wisely, attempts no explanation, because it is perfectly obvious that that which has occurred was within the contemplation of the parties and was by the policy specifically contracted as to.

The State has almost plenary power as to insurance contracts, and this Court should, except in the clearest cases, credit the Legislature with power to act.

It may require a deposit of securities (*Paul* v. *Virginia*, 8 Wallace (U. S. 1869) 168, 19 L. Ed. 357); may force them to comply with the State laws in detail (*Hooper* v. *People*, 155 U. S. 648, 39 L. Ed. 297); may compel them to settle on the basis of the value of the policy rather than on the actual loss (*Orient Ins. Co.* v. *Daggs*, 172 U. S. 557, 43 L. Ed. 552); may make policies valid even if erroneous answers were given, if not fraudulently given (*John Hancock Life Ins. Co.* v. *Warren*, 181 U. S. 73, 45 L. Ed. 755; *Northwestern Mutual Life Ins. Co.* v. *Riggs*, 203 U. S. 243, 51 L. Ed. 168); can regulate the forfeiture of policies for the non-payment of premiums (*N. Y. Life Ins. Co.* v. *Cramer*, 178 U. S. 389, 44 L. Ed. 1116); and can compel an insurance company to file a certificate before contracts.

(*Commonwealth* v. *Hock Age Mutual Benefit Association*, 31 Leg. Int. 245, 10 Phila. 554. See, also, *Eagle Ins. Co.* v. *Ohio*, 153 U. S. 445, 38 L. Ed. 779.)

The principle as to the State's power was affirmed in *Hutchinson Ice Cream Company* v. *State*, 242 U. S. 153, 61 L. Ed. 217.

And again in the *Queens Gas Company* case, wherein the Court refused to review the facts, or even the reasonableness of an administrative order, *N. Y. ex rel. McCall*, 245 U. S. 345, 62 L. Ed. 337.

The same principle was reaffirmed by this Court by Mr. Justice Day in the Municipal Fuel Yard Case, *Jones* v. *Portland*, 245 U. S. 217 at 221, 62 L. Ed. 252, wherein he said:

> "While the ultimate authority to determine the validity of legislation under the 14th Amendment is rested in this Court, local conditions are of such varying character that what is or is not a public use in a particular state is manifestly a matter respecting which local authority, legislative and judicial, has peculiar facilities for securing accurate information."

Mr. Justice McKenna rested the case of *Bunting* v. *Oregon*, 242 U. S. 426, 61 L. Ed. 830, in no small degree in the same principles.

Mr. Justice Holmes in the case of *Hebe Co.* v. *Shaw*, 248 U. S. 297, 63 L. Ed. 256, said:

> "If the character or effect of the article so intended to be used be debatable, the Legislature is entitled to its own judgment and that judgment is not to be superseded by the verdict of a jury, or, we may add, by the personal opinion of the judges, upon the issue which the Legislature has decided."

The same proposition formed the chief justification given by Mr. Justice Day in upholding the non-partisan legislation of North Dakota, wherein the Court says:

> "What was or was not a public use was a question concerning which local authorities, legislative and judicial, had special means of securing information to enable them to form a judgment; and particularly that the judgment of the highest Court of the State, declaring a given use to be public in its nature, would be accepted by this Court unless clearly unfounded." (*Green* v. *Frazier*, 253 U. S. 233 at 242, 64 L. Ed. 878.)

It, therefore, must be concluded that if presumption is to be engaged in to support the law, only clear and demonstrated usurpation of power will authorize interference with legislative action (*Green* v. *Frazier*, 253 U. S. 233, 64 L. Ed. 878). Other cases in which the Courts have deferred to the Legislature are: *Dominion Hotel Co.* v. *Ontario*, 249 U. S. 266, 62 L. Ed. 597 (Mr. Justice Holmes declared the 14th Amendment is not a pedagogical requirement of the impracticable) page 268; *U. S.* v. *Standard Brewery*, 251 U. S. 210, 64 L. Ed. 209; *State* v. *Cantwell*, 179 Mo. 245, 78 S. W. 569, affirming *Cantwell* v. *Mo.*, 199 U. S. 602, 50 L. Ed. 329; *N. Y. ex rel.* v. *Hesterberg*, 211 U. S. 31, 53 L. Ed. 75; *Parrott* v. *Benson*, 114 Wash. 116, 194 Pac. 986; *State v. Pitney*, 79 Wash. 608 at 612, 140 Pac. 918; *Securities Savings Bank* v. *California*, 263 U. S. 282, 68 L. Ed. 301.

In *O'Gorman* v. *Hartford Fire Ins. Co.*, 282 U. S. 257, 75 L. Ed. 327, the Court declared:

> "The business of insurance is so far affected with a public interest that the State may regulate the rates (*German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389, 58 L. Ed. 1011, L. R. A. 1915C, 1189, 34 S. Ct. 612), and likewise the relations of those engaged in the business (*La Tourette* v. *McMaster*, 248 U. S. 465, 63 L. Ed.

362, 39 S. Ct. 160; *Stipcich* v. *Metropolitan L. Ins. Co.*, 277 U. S. 311, 320, 72 L. Ed. 895, 899, 48 S. Ct. 512). Compare *McCarter* v. *Firemen's Ins. Co.*, 74 N. J. Eq. 372, 382, 29 L. R. A. (N. S.) 1194, 135 Am. St. Rep. 708, 73 Atl. 80, 414, 18 Ann. Cas. 1048. * * *

"The statute here questioned deals with a subject clearly within the scope of the police power. We are asked to declare it void on the ground that the specific method of regulation prescribed is unreasonable and hence deprives the plaintiff of due process of law. As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute. It does not appear upon the face of the statute, or from any facts of which the Court must take judicial notice, that in New Jersey evils did not exist in the business of fire insurance for which this statutory provision was an appropriate remedy. The action of the legislature and of the highest Court of the State indicates that such evils did exist. The record is barren of any allegation of facts tending to show unreasonableness."

(*Hartford, etc. Co.* v. *Nelson Co., supra.*)

It might well be held under the pleadings here that no question whatever as to the full faith and credit clause was presented, for the controversy turns upon the construction of a statute. *Western, etc. Indemnity Co.* v. *Rupp*, 235 U. S. 261, 59 L. Ed. 220; *Ohio* v. *Chattanooga, etc. Co.*, 289 U. S. 440, 77 L. Ed. 1308.

We find nothing *contra* in *Royal Arcanum* v. *Green*, 237 U. S. 531, 59 L. Ed. 1089, reversing 206 N. Y. 591, 100 N. E. 411, and Mississippi's opinion may be supported thereby, for the contract here to be construed makes express reference to the possibility of invalidity, and having so done, deals with property sitused in Mississippi belonging to a corporation of Mississippi and protecting it against

defalcation occurring therein by its officers, who were subject solely to Mississippi's laws.

Mississippi's statute, as construed, went no further than to protect a Mississippian as against an admitted foreign corporation in a matter whereasto Mississippi had found it essential to legislate. Mississippi's Statute, Sec. 2294, Code 1930, provided:

> "The limitations prescribed in this chapter shall not be changed in any way whatsoever by contract between parties, and any change in such limitations made by any contract stipulation whatsoever shall be absolutely null and void; the object of this statute being to make the period of limitations for the various causes of action the same for all litigants."

Mississippi recognized the rule in *Allgeyer* v. *Louisiana*, 165 U. S. 578, 41 L. Ed. 832, and gave to it unqualified approval. *Swing* v. *Brister*, 87 Miss. (1905) 528, and in matters of insurance has consistently sought to follow this Court. *Berry* v. *Lamar Life Ins. Co.*, 165 Miss. 405, 145 So. 887, following *Bergholm* v. *Peoria Life Ins. Co.*, 284 U. S. 489, and initially held contracts of this type valid. *Southern Express Co.* v. *Hunnicutt*, 54 Miss. 566, *Universal Life Ins. Co.* v. *Whitehead*, 58 Miss. 231; *Bonner* v. *Mutual Life Ins. Co.*, 36 So. 538; but on May 9, 1904, this statute quoted was adopted, and thereof the Mississippi Court said in *Dodson* v. *Telegraph Co.*, 97 Miss. 104, 52 So. 693:

> "On the original hearing of this case we held that Code 1906, Sec. 3127, abrogated any right that the telegraph company heretofore assumed to make as one of its stipulations, that it would not be liable for damage in any case where claim therefor was not presented within sixty days after the message was filed with the company. Section 3127 prohibits changing 'in any way whatsoever' the limitation prescribed in the chapter, and further provides that 'any change in such limita-

tion made by any contract stipulation whatsoever shall be absolutely null and void.' Under a statute so broad as this, concluding with the declaration that its purpose 'is to make the period of limitation for the various causes of action the same for all litigants,' it is difficult for us to perceive how its full scope and effect could be carried out unless it is made to comprehend this very case. In the *Hunnicutt case,* 54 Miss. 566, 28 Am. Rep. 385, this Court upheld this stipulation; but there was then no statute on the subject. The vast array of authorities cited in the brief of counsel have no application, in our judgment, because the statute under discussion strikes down all such decisions. The regulation of the company says you cannot sue unless your claim be presented within sixty days. This regulation, if given effect, may in some instances, and in this very case will be a limitation in itself. If it is possible, therefore, under certain conditions, for the stipulation to become itself a limitation, how can it be soundly argued that such a stipulation does not change the limitation prescribed by the chapter 'in any way whatsoever?' If it does this, or if the stipulation superimposes conditions with which there must be a compliance or rights will be barred from suit, it is amending the statute by the telegraph company saying that, notwithstanding same, a person shall be barred unless he comply with certain conditions imposed by it, and such conditions are void under the statute. Stipulations of the character under discussion are not viewed as contracts in any true sense.

* * *

"Many States have statutes prohibiting these stipulations, and independently of statutes some Courts have held these regulations void as against public policy. The construction of this Court with reference to this statute is not unusual. In the case of *Davis* v. *Western Union, etc., Co.*, 107 Ky. 527, 54 S. W. 849, 92 Am. St. Rep. 371, it is held that a stipulation, in a contract between a telegraph company and sender of a message, that the company will not be liable for

damages in any case if the claim is not presented in writing within sixty days after the message is filed, is void as against public policy. To the same effect is the case of *Western Union, etc., Co.* v. *Eubanks*, 100 Ky. 591, 38 S. W. 1068, 36 L. R. A. 711, 66 Am. St. Rep. 361. In the case of *Pacific Tel. Co.* v. *Underwood*, 37 Neb. 315, 55 N. W. 1057, 40 Am. St. Rep. 490, it was held that this same condition, providing that the company should not be liable for damage unless the claim was presented within sixty days, was unreasonable and without consideration, viewed as a contract, and void as an attempt on the part of the company to limit its liability for its negligence by enacting for itself a statute of limitations. The same thing is held in the case of *Western Union, etc., Co.* v. *Longwill*, 5 N. W. 308, 21 Pac. 339. In short, it was within the power of the legislature to prescribe that these stipulations should be abolished, and this we think Section 3127 has done."

Note the declaration of the Court in this very case: "The provision is a limitation of the action in this case, our statute of limitations being for six years" (citing cases).

Compare *Stuyvesant Insurance Co.* v. *Smith Motor Sales Co.*, 99 So. 575, 135 Miss. 585, wherein the contract was initially written in Tennessee, but the property having come into Mississippi was held, in a more extreme case than the present, bound by Mississippi's laws.

Compare *Standard Accident Insurance Co.* v. *Broom*, 111 Miss. 409, 71 So. 653, 654; *National Casualty Co.* v. *Mitchell*, 138 So. 808, 162 Miss. 197.

Mississippi thus by statute having made this rule a limitation as to property sitused within Mississippi, may Tennessee by contract delivered through an agency there, with the contractor domiciled in Hartford and the Land Company domiciled at Scott, subvert that within this rule of law Mississippi's legislation, at the instance of the Insurance Company, which has qualified in Mississippi, and as pro-

vided by the policy itself, for the precise contingency covered by Mississippi's laws?

Compare *Gallaher* v. *State Mutual Life Ins. Co.*, 150 Ala. 543, 43 So. 833, construing similar statute.

Note *Palmetto Fire Ins. Co.* v. *Cohn*, 272 U. S. 295, 71 L. Ed. 243, wherein it was held constitutional for a State to levy a tax on an insurance company while located in another State, which contracted in a third State with a sales corporation resident therein to insure its customers against loss on the articles purchased from it against fire and theft so far as the articles within the possession of the purchaser were within that State, and to exclude the insurance company from the right to do business within the State upon failure to pay their taxes. Note *Fidelity, etc., Co.* v. *Tafoya*, 270 U. S. 426, 70 L. Ed. 664. *Nutting* v. *Massachusetts*, 183 U. S. 553, 46 L. Ed. 327; *Conn. Mutual Life Ins. Co.* v. *Spratley*, 172 U. S. 602, 43 L. Ed. 569; *New York Life Ins. Co.* v. *Cravens*, 178 U. S. 389, 44 L. Ed. 1116; *Paul* v. *Virginia*, 8 Wall. 177, 19 L. Ed. 359.

Mississippi has not as to this contract sought to do anything that has, with deference, ever been condemned by this Court.

D. *Tennessee decisions referred to not applicable herein.*

As was said in the *Rupp* case, *supra:*

> "It does not appear that the Court's attention was called to any decision by the Courts of Illinois placing a different construction, or indeed, any construction, upon the section in question. If such decision existed, it was incumbent upon defendant to prove it as a matter of fact. We are referred to no authoritative judicial construction of the statute in the state of its origin, nor have we searched for any, for what is matter of fact in the State Court is matter of fact in this Court upon review; and this applies where foreign law is in question in the State Court as well as to any other

issue of face. *Hanley* v. *Donoghue*, 116 U. S. 1, 6, 29 L. Ed. 535, 537, 6 Sup. Ct. Rep. 242; *Chicago & A. R. Co.* v. *Wiggins Ferry Co.*, 119 U. S. 615, 622, 30 L. Ed. 519, 522, 7 Sup. Ct. Rep. 398."

Appellant has not pleaded any Tennessee decision which holds that as to property sitused in Mississippi owned by a Mississippian, insured with a Connecticut corporation, as to which proof of loss must be made at Hartford, that the Tennessee Court would hold quoad that sitused in Mississippi, that the Tennessee common law would control. In short, that Mississippi quoad that in Mississippi did not have a right to dictate its own public policy.

Guthrie v. *Indemnity Association*, 101 Tenn. 643, pleaded as a fact, merely held, upon concession, that contractual limitations are valid and enforceable. Concessions do not make judicial precedents. *Cross* v. *Burke*, 146 U. S. 83, 36 L. Ed. 896; *Adams, State Rev. Agent* v. *Y. & M. V. R. R. Co.*, 77 Miss. 278.

That therein determined was that a saving clause from the power of the general statutes was not applicable to a contractual limitation, nor was absence from the State; in addition, this was a Tennessee contract upon a citizen of Tennessee sought to be enforced in Tennessee.

Phoenix Cotton Oil Co. v. *Royal Indemnity Co.*, 140 Tenn. 442, indicates contrariety in Tennessee as to the judicial holding. That there determined was as to an accident in Tennessee under a policy issued in Tennessee whereunder immediate notice was required.

Bristol v. *Bostwick*, 146 Tenn. 205, applied to the City of Bristol under a contract for local performance guaranteed pursuant to a State statute.

None, therefore, of these cases set up an applicability of a rule as to property in Mississippi insured by a Mississippian with a Connecticut Company, of which part per-

formance was had in Connecticut and whereasto, that in Mississippi, Mississippi had a definite public policy.

In *London Assurance Corporation* v. *Barrieos*, 167 U. S. 149, 42 L. Ed. 113, it was specifically held that the place where the contract is to be performed will govern its construction. Compare 2 *Cooley's Briefs on Insurance*, 2nd Ed., p. 1028, and Sheppard's Citation of the *Barrieos* case.

Compare the declaration in *The Kensington*, 183 U. S. 269, 46 L. Ed. 193:

> "It is true, as a general rule, that the *lex loci* governs, and it is also true that the intention of the parties to a contract will be sought out and enforced. But both these elementary principles are subordinate to and qualified by the doctrine that neither by comity nor by the will of contracting parties can the public policy of a country be set at naught."

See 2 *Cooley's Briefs on Insurance*, 2nd Ed., 1035, where there is cited with approval *Insurance Co.* v. *Block*, 12 Ohio Cir. Ct. R. 224, declaring:

> "Where a State, to shield and protect its own citizens, passes a law which shall govern and control the making of such contracts, the law throws its protecting shield over the citizens of the State, and will determine the rights of parties if the laws of two States conflict."

Compare *New York Life Ins. Co.* v. *Cravens*, 178 U. S. 389, 44 L. Ed. 1116; *Cuba R. Co.* v. *Crosby*, 222 U. S. 473, 56 L. Ed. 275.

In *Finney* v. *Guy*, 189 U. S. 335, 47 L. Ed. 839, Mr. Justice Peckham said:

> "In this case the statutes, together with references to the decisions of the state Courts, are given in the complaint, and the pleader, by making an averment in the form of a fact, assumes to give a meaning to them such as he thinks to be correct; but the duty still re-

mains with the Courts to themselves determine from those statutes and decisions what is in truth the law of the foreign jurisdiction. The Courts are not concluded by an averment of what is the law in a foreign jurisdiction, contained in a pleading which is demurred to, any more than they would be by the testimony of a witness to the same effect upon a trial; certainly not when the statute upon which the case rests is set forth and the decisions under it are also referred to as evidence of the law. The demurrer does not admit as a fact that the construction (in the form of an averment of fact) which the pleader may choose to put upon those statutes or decisions is the right conclusion to be drawn from them. Notwithstanding the averments in the complaint, we are brought to an examination of the statutes and decisions referred to, in order to ourselves determine what the law of Minnesota is."

So that by the demurrer herein we did not admit aught than the facts well pleaded, and especially not that Tennessee's law extended to that in Mississippi, whereover Mississippi had asserted a definite public policy, and that these Tennessee decisions prescribe any such rule in the instant case.

In *New York Life Insurance Co.* v. *Head*, 234 U. S. 162, 58 L. Ed. 1264, this Court had the question as to whether or not the non-forfeiture provisions of Missouri statutes could be integrated into a loan executed in New York by a resident of New Mexico, as to a policy initially written in Missouri. Compare 241 Mo. 403, 147 S. W. 827. And the Court said through the Chief Justice:

"And this concession brings us to consider the second general inquiry, which is the power of the state of Missouri to extend the operation of its statutes beyond its borders into the jurisdiction of other states, so as in such other states to destroy or impair the right of persons not citizens of Missouri to contract,

> although the contract could in no sense be operative in Missouri, and although the contract was sanctioned by the law of the state where made. That is to say, the right of a state where a contract concerning a particular subject-matter not in its essence intrinsically and inherently local is once made within its borders not merely to legislate concerning acts done or agreements made within the state in the future concerning such original contract, but to affect the parties to such original contract with a perpetual contractual paralysis following them outside of the jurisdiction of the state or original contract by prohibiting them from doing any act or making any agreement concerning the original contract not in accord with the law of the state where the contract was originally made. In other words, concretely speaking we must consider the validity of the loan agreement; that is, how far it was within the power of the state of Missouri to extend its authority into the state of New York, and there forbid the parties, one of whom was a citizen of New Mexico and the other a citizen of New York, from making such loan agreement in New York simply because it modified a contract originally made in Missouri."

The land company had its farm in Mississippi where all of its operations of this character were conducted or at least should have been conducted, for unless a farmer lives on his farm the profit forthwith disappears. The Indemnity Company had its Home Office in Hartford, Connecticut, whereto the proof was made and whereat it was examined, and that herein sought by Tennessee is, notwithstanding the provision of the contract that it should cover any employe "in any position anywhere", and that if the limitation therein as to time be void "under the law of the place governing the construction thereof," then within the shortest period of limitation permitted by law, to strike down in virtue of Tennessee's law, as the original place

where an agent made delivery (apparently and naught else), that which as to liability was fixed by Mississippi's statutes and decisions and was controlled either by Mississippi or Connecticut. It is perfectly true that this Court held in *Allgeyer* v. *Louisiana*, 165 U. S. 578, 41 L. Ed. 832, that Louisiana's act prohibiting the making of a contract outside of the State as to property therein deprived the party of property without due process of law. Mississippi allows the contract, but makes it conform to her public policy. Under *Hooper* v. *California*, 155 U. S. 648, 39 L. Ed. 297, there was no power by an Insurance Company or agents doing business in a State to do acts in that state under a policy in contravention of the State statutes. As stated in the Allgeyer Case:

> "The mere fact that a citizen may be within the limits of a particular state does not prevent his making a contract outside its limits while he himself remains within it. * * * The contract in this case was thus made. It was a valid contract, made outside of the state, to be performed outside of the state, although the subject was property temporarily within the state."

The cases cited by the appellant from the several states but apply this decision, as does Mississippi. *Brister* v. *Swing*, 87 Miss., *supra*.

The case of *Hooper* v. *California*, 155 U. S. 652, 39 L. Ed. 299, is more nearly in point, when it is said:

> "It is said that the right of a citizen to contract for insurance for himself is guaranteed by the 14th Amendment, and that, therefore, he cannot be deprived by the state of the capacity to so contract through an agent. The 14th Amendment, however, does not guarantee the citizen the right to make within his state, either directly or indirectly, a contract, the making whereof is constitutionally forbidden by the state. The proposition that, because a citizen might make

> such a contract for himself beyond the confines of his state, therefore he might authorize an agent to violate in his behalf the laws of his state, within her own limits, involves a clear *non sequitur*, and ignores the vital distinction between acts done within and acts done beyond a state's jurisdiction."

Compare *National Union Fire Ins. Co.* v. *Wanberg*, 260 U. S. 71, 67 L. Ed. 136, whereunder it was held constitutional to require acceptance within 24 hours, and the Supreme Court there reaffirmed the earlier holdings. *Bothwell* v. *Buckbee, Mears Co.*, 275 U. S. 277, 72 L. Ed. 279; *Hartford, etc., Co.* v. *Nelson, supra.*

There can be no doubt about Mississippi's power to control her own corporations and to this class belonged the Land Company; nor can there be any doubt about the right to admit foreign corporations, especially insurance companies, and thereover Mississippi possessed the plenary power vouchsafed. So under the reasoning thus announced in *New York Life Insurance Co.* v. *Head, supra*, we respectfully submit that as to this contract thus affecting that within Mississippi there is no invasion of constitutional right.

In *Ohio* v. *Chattanooga Boiler & Tank Co.*, 289 U. S. 440, 77 L. Ed. 1308, the Court had before it the effect of the Tennessee Compensation Act, and in the note said:

> "Had the question been merely the construction of the statute, no issue under the full faith and credit clause would have arisen. *Banholzer* v. *New York L. Ins. Co.*, 178 U. S. 402, 44 L. Ed. 1124, 20 S. Ct. 972; *Johnson* v. *New York L. Ins. Co.*, 187 U. S. 491, 495, 496, 47 L. Ed. 273-275, 23 S. Ct. 194; *Pennsylvania F. Ins. Co.* v. *Gold Issue Min. & Mill. Co.*, 243 U. S. 93, 96-97, 61 L. Ed. 610, 616, 617, 37 S. Ct. 344."

And that which we herein present is that as to those decisions so thus made, Mississippi's Court only inter-

preted that they did not extend, under the common law upon which they were based, to a contract whereasto Mississippi had made a specific statutory declaration; thereby, as to such declaration, superseding and suspending that which would otherwise have been the rule under the common law, which would, of course, preclude there being any decision herein hereon.

In *Townsend* v. *Jemison*, 9 How. 407, 13 L. Ed. 194, a cause of action arose in Mississippi more than three years before the suit was brought, which statute would have barred in Mississippi, and suit being brought in Alabama, the Court there held that Alabama's statute as to limitations controlled, and the fact that it would have been barred had it been brought in Mississippi in no wise constituted a good defense. It is to be noted that Mississippi has, as to this particular form of agreement, specifically as to local property held that the provision is one of limitation and not affecting the right to sue, and here now that at issue is, the suit being in Mississippi, is it competent for Mississippi as to the remedy thereon to be given to apply that rule as to the statute of limitation which obtained in Mississippi?

E. *Appellant's cases.*

(1) *Allgeyer* v. *Louisiana*, 165 U. S. 578, 41 L. Ed. 832, involved a penalty for an act whereasto defendant possessed a constitutional right. The full faith and credit clause was in no way involved, nor did this Court assume to say that Louisiana might have assumed jurisdiction over a citizen of Louisiana writing a policy of insurance to cover an interest in Louisiana with a corporation that had agreed to abide by Louisiana's laws. Naught therein contravenes that herefor contended, as appellant upon being informed of this defalcation in Mississippi may have sent its agent in Mississippi to examine the records there kept and to

ascertain the facts therefrom, and having so done to forthwith there make payment.

(2) *New York Life Insurance Co.* v. *Head*, 234 U. S. [illegible], 58 L. Ed. 1259. There Head, a citizen of New Mexico, temporarily in Kansas City, made an application for two policies to be issued in New York, which "should be considered as having been issued in New York and be treated as a New York contract". Official Edition, 154-5, L. Ed. 1262. Upon returning to Kansas City, the policies were delivered, and nine years after in New Mexico one was transferred to a daughter, who borrowed from the Insurance Company $2,270.00. The loan was requested from New Mexico, accompanied by the policy and which was pledged to secure the indebtedness. Then under the New York law, where the contract was made and was to be performed, an application of the surplus was made. The case involved the contract clause and the 14th Amendment, and the Court was at pains to say that the Missouri Court did not modify its view "By the fact that the insured was a non-resident of Missouri" and by the further fact that, on the face of the policy it was clearly manifest that it was executed not for the purpose of having effect in Missouri, but to be operative outside of that state. This Court thereupon held that Missouri might not thus forbid "the parties, one of whom was a citizen of New Mexico and the other a citizen of New York", from making such loan agreement in New York simply because it modified a contract originally made in Missouri. That is not the case at bar.

(3) *New York Life Insurance Co.* v. *Dodge*, 246 U. S. 357, 62 L. Ed. 772, is not in any wise *contra;* and the dissent of Mr. Justice Brandeis, especially Point 4 therein, page 387, Official Edition 787, is well taken:

> "Fourth: Furthermore, the right of citizens of the United States which the Allgeyer Case sustained 'is

the liberty of natural, not artificial, persons.' *Northwestern Nat. L. Ins. Co.* v. *Riggs*, 203 U. S. p. 255, 51 L. Ed. 173, 27 Sup. Ct. Rep. 126, 7 Ann. Cas. 1104. While a State may not (except in the reasonable exercise of the police power) impair the freedom of contract of a citizen of the United States, 'it can prevent the foreign insurers from sheltering themselves under his freedom.' *Nutting* v. *Massachusetts*, 183 U. S. 553, 558, 46 L. Ed. 324, 327, 22 Sup. Ct. Rep. 238; *South Carolina ex rel. Phoenix Mut. L. Ins. Co.* v. *McMaster*, 237 U. S. 63, 59 L. Ed. 839, 35 Sup. Ct. Rep. 504. The insurance company cannot be heard to object that the Missouri statute is invalid, because it deprived Dodge of rights guaranteed to natural persons, citizens of the United States. *Erie R. Co.* v. *Williams*, 233 U. S. 685, 705, 58 L. Ed. 1155, 1163, 51 L. R. A. (N. S.) 1097, 34 Sup. Ct. Rep. 761; *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 576, 59 L. Ed. 364, 368, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570."

Equitable Life Assurance Society v. *Pettus*, 140 U. S. 226, 35 L. Ed. 497; *Mutual Life Ins. Co.* v. *Hall*, 193 U. S. 551, 48 L. Ed. 788.

See, especially, *American Fire Ins. Co.* v. *King Lumber & Mfg. Co.*, 250 U. S. 11, 63 L. Ed. 815.

(4) *Aetna Life Ins. Co.* v. *Duncan*, 266 U. S. 389, 69 L. Ed. 342.

For the distinctions thereasto we refer to our brief opposing jurisdiction. Compare, further, *Binney* v. *Nelson*, 183 U. S. 144, 46 L. Ed. 125, where it is said:

"Passing to a consideration of the stockholders' contract in the light of the other contention, it may be said that ordinarily it is controlled by the law of the State in which the incorporation is had. That is the place of contract, and, generally, the law of the place where a contract is made governs its nature, interpretation, and obligation. While this is so, it is also true that parties in making a contract may have

in view some other law than that of the place, and when that is so that other law will control. That the parties have some other law in view and contract with reference to it is shown by an express declaration to that effect. In the absence of such declaration it may be disclosed by the terms of the contract and the purpose with which it is entered into. In *Pritchard* v. *Norton*, 106 U. S. 124, 27 L. Ed. 104, 1 Sup. Ct. Rep. 104, many cases were cited by Mr. Justice Matthews, delivering the opinion of the Court, in which these propositions were illustrated and enforced, and on page 136, L. Ed. p. 108, Sup. Ct. Rep. p. 112, it was said:

"'The law we are in search of, which is to decide upon the nature, interpretation and validity of the engagement in question, is that which the parties have, either expressly or presumptively, incorporated into their contract as constituting its obligation. It has never been better described than it was incidentally by Mr. Chief Justice Marshall, in *Wayman* v. *Southard*, 10 Wheat. 1, 48, 6 L. ed. 253, 264, where he defined it as a principal of universal law—'the principle that in every forum a contract is governed by the law with a view to which it was made.' The same idea had been expressed by Lord Mansfield in *Robinson* v. *Bland*, 2 Burr. 1077, 1078: 'The law of the place,' he said, 'can never be the rule where the transaction is entered into with an express view to the law of another country as the rule by which it is to be governed.' And in *Lloyd* v. *Guibert*, L. R. 1 Q. B. 115, 120, in the Court of Exchequer Chamber, it was said that 'it is necessary to consider by what general law the parties intended that the transaction should be governed, or, rather, by what general law it is just to presume that they have submitted themselves in the matter.' *Le Breton* v. *Miles*, 8 Paige 261.'"

And further:

"Now, when they in terms specified that they were framing a corporation for the purpose of having that

corporation do business in California, is it not clear that they were contracting with reference to the laws of that State? Contracting with reference to the laws of that State they must be assumed to know the provisions of those laws; that by them a personal liability was cast upon the stockholders in corporations formed under the laws of the State, and that that same liability was also imposed upon the stockholders of corporations formed under the laws of other States and doing business within California. How can it be said that those laws do not enter into the contract and control as to all business done in pursuance of that contract within the limits of California? Suppose these same stockholders in Colorado had formed a partnership with the expressed intent of carrying on business in California, would not that expressed intent be a clear reference to the laws of California and an incorporation of those laws into the liabilities created by the partnership business in California? And if this rule obtains as to contracts of partners between themselves, why not also as to contracts of stockholders between themselves in forming a corporation?"

There was no statute in Tennessee, but an individual in Mississippi created by Mississippi and a foreign corporation, qualified to do business in Mississippi, made a contract as to property sitused in Mississippi, and that at issue is may those two thus contracting subvert Mississippi's laws as to that sitused within Mississippi contrary to the public policy of Mississippi?

(5) *Home Ins. Co. v. Dick*, 281 U. S. 397, 74 L. Ed. 926.

In addition to the points hereinbefore made and stated in the motion in opposition to jurisdiction, we submit:

First. The policy involved in that case was issued by a Mexican Company; the contract was executed and delivered in Mexico to one Bonner, of Tampico, Mexico, and was by him assigned to Dick who resided in Mexico at the time

of the assignment. The policy covered a tug boat owned by the Mexican Company and it covered the vessel only in certain Mexican waters. The premium was paid in Mexico and the loss was payable in the City of Mexico in current Mexican funds. The contract of insurance expressly provided that it should be construed and governed under the laws of Mexico. The contract of reinsurance was effected by correspondence between the Mexican Company in Mexico and the New York Companies in New York. At the time the policy was issued, when it was assigned to him, and until after the loss Dick resided in Mexico. The loss occurred in Mexico. The Mexican Company was not authorized to do business in Texas, nor was it in Texas or doing any business in Texas. Not one single act pertaining to the issuance of the policy, its performance, or the loss sustained thereunder was done or required to be done or occurred in Texas. The contract was executed in Mexico upon property located in Mexico, was performed in Mexico, the loss occurred in Mexico, all of the parties to the contract were in Mexico at the time of the loss, and everything was done and performed with reference to the contract in Mexico, except the institution of the suit.

The suit was instituted in Texas in the nature of garnishment proceedings against the reinsurers. The Mexican Company was never in Texas, never before the Court, and no jurisdiction of that company was ever acquired by the Court.

Second. The statute sought to be invoked in the Texas courts, Article 5545 of the Texas Revised Civil Statutes, is as follows:

> "No person, firm, corporation, association, or combination of whatsoever kind shall enter into any stipulation, contract or agreement by reason whereof the time in which to sue thereon is limited to a shorter

> period than two years. And no stipulation, contract, or agreement for any such shorter limitation in which to sue shall ever be valid in this state."

In order to avoid any misconstruction of the decision in this case (such as counsel for appellant has done) it is well to keep in mind that the construction of the statute involved was based upon its application to the particular state of facts of that case, likewise the whole decision rests upon the law announced as applied to these facts.

The first point decided by the Court was on the question of jurisdiction. In deciding that point the Court held that for that purpose it was not concerned with the question whether the provision complained of in the contract requiring the suit to be brought within one year was a condition precedent to the existence of the cause of action or making failure to sue within the year a breach of a condition subsequent which extinguishes the cause of action or whether the provision is properly described as relating to remedy or to substance.

In disposing of this point the Court construed the Texas statute and applied it to the particular facts of that case, using this language:

> "The statute is not simply one of limitation. It does not merely fix the time in which the aid of the Texas courts may be invoked. Nor does it govern only the remedies available in the Texas courts. It deals with the powers and capacities of persons and corporations. It expressly prohibits the making of certain contracts. *As construed*, it also directs the disregard in Texas of contractual rights and obligations wherever created and assumed; and it commands the enforcement of obligations in excess of those contracted for. Therefore, the objection that, as applied to contracts *made and to be performed outside of Texas*, the statute violates the Federal Constitution, raises Federal questions of substance; and the existence of the Federal claim is not disproved by saying

"that the statute, or the one-year provision in the policy, relates to the remedy and not to the substance."

A casual reading of the statute discloses its non-similarity to the Mississippi statute. The Texas statute prohibits the making of a contract limiting the time to sue to a shorter period than two years, thus making the contract void under the law of Texas, whether it is to be performed in Texas or elsewhere. It prohibits the right of the parties to contract without reference to any statute of limitations. It attempts to control the right of the parties whether such right be in violation of any statute of limitations in Texas or not, or whether it violates or does not violate the laws of any other State where the contract is to be performed. While on the other hand the statute of Mississippi does not prohibit the parties from making any kind of a contract except a contract that attempts to change the statute of limitations of Mississippi. Note the language of Section 2294 Mississippi Code of 1930, *supra.*

Thus we have the Texas statute as applied to the facts in the Home Insurance Company case attempting to prohibit parties outside of Texas from entering into a contract, with certain provisions therein, which contract was executed, performed, and the loss sustained thereunder outside of Texas, and nothing thereunder or thereasto was done or performed in Texas. While on the other hand the Mississippi statute is limited in its provisions to contracts which attempt to change the statutory law of limitations of Mississippi as to that sitused in Mississippi and limited to that so thus there located, Mississippi's decisions herein being controlling thereasto, *Hartford etc. Co.* v. *Nelson, supra.*

The second point decided by the Court in the Home Insurance Company case was that:

"The Texas statute as here construed and applied deprives the garnishees of property without due

process of law. A state may, of course, prohibit and declare invalid the making of certain contracts within its *borders, even of contracts validly made elsewhere, if they are required to be performed within the state and their performance would violate its laws.* But, in the case at bar, *nothing in any way relating to the policy sued on,* or to the contracts of reinsurance, *was ever done* or required to be done in Texas. All acts relating to the making of the policy were done in Mexico. All in relation to the making of the contracts of reinsurance were done there or in New York. And, likewise, all things in regard to performance were to be done outside of Texas. Neither the Texas laws nor the Texas courts were invoked for any purpose, except by Dick in the bringing of this suit. The fact that Dick's permanent residence was in Texas is without significance. At all times here material, he was physically present and acting in Mexico. Texas was, therefore, without power to affect the terms of contracts so made. * * *." (Marks of emphasis ours.)

It will be noted that the construction of the statute was based solely upon its application to the facts of this particular case, the gist of which is that the contract was made and performed outside of Texas, and nothing whatsoever pertained thereto was done in Texas. An entirely different case from the case at bar.

Under headnote 6 of the opinion under this, the second point, the Court said:

"And, in the absence of a contractual provision, the local statute of limitation may be applied to a right created in another jurisdiction even where the remedy in the latter is barred. In such cases, the rights and obligations of the parties are not varied. When, however, the parties have expressly agreed upon a time limit on their obligation, a statute which invalidates the agreement and directs enforcement of the contract after the time has expired increases their obligation and imposes a burden not contracted for."

The Court in using this language was dealing with a case wherein the general statute of limitations is involved, with no provision declaring that a contract which changed the statute was void. In other words, the situation is similar to the situation which existed in Mississippi at the time the decision was rendered in *Ward* v. *Fire Insurance Company*, 82 Miss. 124.

However, the Court under headnote 6 proceeded to limit the holding above and stated:

> "It is true also that a state is not bound to provide remedies and procedure to suit the wishes of individual litigants. It may prescribe the kind of remedies to be available in its courts and dictate the practice and procedure to be followed in pursuing those remedies. Contractual provisions relating to these matters, even if valid where made, are often disregarded by the court of the forum, pursuant to statute or otherwise. But the Texas statute deals neither with the kind of remedy available nor with the mode in which it is to be pursued. It purports to create rights and obligations. It may not validly affect contracts which are neither made nor are to be performed in Texas."

It will be observed that the Court recognizes the rule applicable to statutes similar to the Mississippi statute, and again points out provisions in the Texas statute that distinguishes it from the Mississippi statute. And in the concluding sentence the Court again gives utterance to the controlling facts which make inapplicable the Texas statute, to-wit:

> "It may not validly affect contracts which are neither made nor are to be performed in Texas."

The third point decided by the Court is:

> "Dick urges that article 5545 of the Texas law is a declaration of its public policy; and that a State may properly refuse to recognize foreign rights which

violate its declared policy. Doubtless, a State may prohibit the enjoyment by persons within its borders of rights acquired elsewhere which violate its laws or public policy; and, under some circumstances, it may refuse to aid in the enforcement of such rights. * * * (Citing authorities.) But the Mexican corporation never was in Texas; and neither it nor the garnishees invoked the aid of the Texas courts or the Texas laws. The Mexican corporation was not before the court. The garnishees were brought in by compulsory process. Neither has asked favors. They ask only to be let alone. *We need not consider* how far the State may go in imposing restrictions on the conduct of its own residents, *and of foreign corporations which have received permission to do business within its borders;* or how far it may go in refusing to lend the aid of its courts to the enforcement *of rights acquired outside its borders.* It may not abrogate the rights of parties beyond its borders having no relation *to anything done or to be done within them.*" (Italics ours.)

Here again the reason for the decision is that the facts to which the statute was applied, showed a case wherein no part of the contract sought to be avoided had any relation to anything done or to be done within the State of Texas. Therefore, the Court did not decide how far a State could go in refusing to recognize, or lend the aid of its courts to the enforcement of, rights acquired outside its borders.

The case at bar differs from the Home Insurance Company case. In the instant case the contract was executed in Tennessee. It was to be performed partially in Tennessee and partially in Mississippi. It was being performed wholly in Mississippi at the time the loss occurred. The parties to the contract were both in Mississippi and doing business in Mississippi. The appellant, a foreign

corporation, having been licensed to do business in Mississippi, and carrying on an insurance business in Mississippi, and the appellee, a Mississippi corporation domiciled in Mississippi, all of its property being located in Mississippi, and all of its business being conducted in Mississippi, with all of its offices and employees located in Mississippi, including the employee who defaulted, and for whose default this suit was instituted. The very property which it was sought, by the policy of insurance, to protect from the dishonest acts of officers and employees was located in Mississippi. The cause of action accrued in Mississippi, and the suit was instituted in Mississippi and both the parties to the contract of insurance were personally before the Court. Whereas, in the Home Insurance case the Mexican Company was not before the Court, was not in Texas, never had been, was not doing and never had done any business in Texas, nor was it authorized to do business in Texas, the property insured was not in Texas, the contract was not made in Texas, nor was anything actually done in Texas pertaining to the contract. The contract covered property never in Texas and expressly provided that it should be subject to the laws of Mexico. The loss under the policy occurred in Mexico. The contract of reinsurance entered into between the Mexican Company and the New York Companies was made and performed in Mexico and in New York and not in Texas. The contract of insurance expressly provided that the tug boat or vessel should only be insured while in Mexican waters. Nothing was done or required to be done concerning the contract which in any way sought the protection or invoked the aid of the Texas laws.

F. Provision as to notice may well be construed as appertaining to the remedy and therefore subject to the law of the forum.

In *National Surety Co.* v. *Architectural Decorating Co.*, 226 U. S. 276, 67 L. Ed. 221, an action was brought against a surety company on a bond conditioned that the contractor should pay all just claims. By Section 4539 of the Minnesota Code, then in force, it was provided:

> "No action shall be maintained on any such bond unless within ninety days after performing the last item of work or furnishing the last item of skill, tools, machinery, or material, the plaintiff shall serve upon the principal and his surety a written notice specifying the nature and amount of his claim, and the date of furnishing the last item thereof, nor unless the action is begun within one year after the cause of action accrues."

On April 22, 1909, this Section was amended by Chapter 413, General Laws of 1909, so as to require the notice of claim to be given within ninety days "after the completion of the contract and acceptance of the building by the proper authorities" instead of "within ninety days after performing the last item of work or furnishing the last item of skill, tools, machinery or materials," and further amended by requiring the action to be begun within one year "after the service of such notice," instead of within one year "after the cause of action accrues." The plaintiff did not give notice to the defendant in time to comply with Section 4539, *supra*, but did give such notice in time to comply with the amended act. The defendant contended that the amended act was unconstitutional because it was enacted after the

contract was made and would impair the obligation of the contract. The Supreme Court of the United States held:

> "In the case now before us, we agree with the Minnesota Supreme Court in the view that the requirement of a preliminary notice to the obligors as a condition precedent to an action upon the bond affects the remedy, and not the substantive agreement, of the parties. And although the statute as it stood when the bond was given (Rev. Laws 1905, Sec. 4539) must, under *Grant* v. *Berrisford*, be treated as if written into the contract, it still imposed a condition not upon the obligation, but only upon the remedy for breach of the obligation. Therefore, the subsequent statute, (Gen. Laws 1909, Chap. 413) effected merely a change in the remedy, without substantial modification of the obligation of the contract."

Compare *Gallagher* v. *State Mutual Life Ins. Co.*, 150 Ala. 543, 43 So. 833. And possessing the right thus to legislate as to remedies that by Mississippi thus done would not violate any of the appellant's constitutional rights.

POINT II.

Counsel contend "there was no 'interest in Mississippi', in any proper sense, to control the validity of the contract."

The only authority cited to support is *Matthews* v. *Employers Liability Assurance Corp.*, 111 N. Y. S. 76, which, with deference, is not cognate. Here, all of the business was being done in Mississippi, and there, only, was the employee obligated to account, and under Mississippi's laws, only, was he in default to a Mississippi corporation, and this indemnity being thus admeasured, Mississippi's laws were sovereign. We commend the opinion as admirably accurate thereasto. *Hartford, etc., Co.* v. *Nelson, supra.* Compare *New York Life Insurance Co.* v. *Craven,*

supra, where only a presumption that the law of the place of contract governs; *Mutual Life Insurance Co. v. Cohen*, 179 U. S. 262, 45 L. Ed. 181, where there is that here existent, that the presumption ceases.

Wherefore, we respectfully submit that the case should be affirmed.

Respectfully,

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